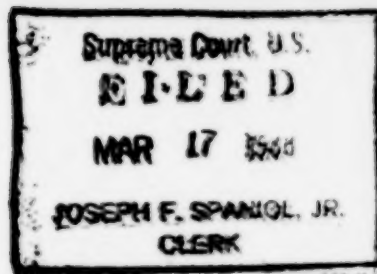


No. 87-1318



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

VOLT INFORMATION SCIENCES, INC.,
Appellant,

vs.

BOARD OF TRUSTEES OF LELAND STANFORD
JUNIOR UNIVERSITY, Appellee.

ON APPEAL FROM THE
COURT OF APPEAL OF CALIFORNIA
SIXTH APPELLATE DISTRICT

APPELLANT'S BRIEF IN OPPOSITION
TO MOTION TO DISMISS OR AFFIRM

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LIST OF AFFILIATED COMPANIES
(Rule 28.1)

Appellant Volt Information Sciences, Inc., is a publicly owned corporation, incorporated in the State of New York. Its subsidiaries (other than wholly owned subsidiaries and wholly owned subsidiaries of wholly owned subsidiaries) are the following: Autologic, Inc., a California corporation; Long Beach Blueprint Company, a California corporation; DataNational Corporation, a Pennsylvania corporation; and Courtney's Pty., Ltd., an Australian corporation. Appellant is also a 50 per cent participant in the following joint ventures: UV Associates, a Missouri joint venture; Australian Directory Services, an Australian joint venture; VNM Directory Support Services, a Nevada joint venture; Pacific Volt Information Systems, a California joint venture; and UVA Company, a Georgia joint venture.

TABLE OF CONTENTS

I. Introduction	1
II. Stanford's Erroneous Assertion That Dismissal of This Appeal Would Have No Precedential Effect Because the Decision of the Court Below "Does Not Exist"	1
III. Stanford's Unfounded Accusation That Volt Has Made a "False" Factual Assertion in Its Jurisdictional Statement	10
IV. Conclusion	12

TABLE OF AUTHORITIES

Cases

Ammex Warehouse Co. v. Gallman, 414 U.S. 802 (1973)	9
Hicks v. Miranda, 422 U.S. 332 (1975)	7-8
Jendralski v. Black, 222 Cal.Rptr. 396 (1986)	4
McKenna v. Straughan, 222 Cal.Rptr. 462 (1986)	4
Miller v. California, 418 U.S. 915 (1974)	8
Tietgen v. City of Pomona, 222 Cal. Rptr. 368 (1986)	4
Tully v. Griffin, 429 U.S. 68 (1976)	8-9

Statutes and Rules

Cal. Rules of Court, Rule 976	2
Cal. Rules of Court, Rule 977	2,3,6
Cal. Rules of Court, Rule 978	2

Articles

Biggs, Censoring the Law in Cali- fornia: Decertification Revisited, 30 Hast.L.J. 1577 (1979)	2,3,6
Note, Decertification of Appellate Opinions, 50 S.Cal.L.Rev. 1181 (1977)	2,3,6

I. Introduction

Most of the arguments advanced in Stanford's Motion to Dismiss or Affirm have been adequately anticipated in Volt's Jurisdictional Statement and therefore require no further response. There are two exceptions to this generalization. The first of these consists of Stanford's contention that dismissal of this appeal would have no precedential effect because the decision of the court below, having been "de-published" by the California Supreme Court, "in essence does not exist" (Motion to Dismiss, pp. 7, 16). The second argument that requires a response consists of Stanford's accusation that Volt has made a "false" assertion in its Jurisdictional Statement regarding the facts of the underlying transaction between the parties (id., p. 13n.3). The remainder of this brief will be devoted to a refutation of these two arguments.

II. Stanford's Erroneous Assertion That Dismissal of This Appeal Would Have No Precedential Effect Because the Decision of the Court Below "Does Not Exist"

The California appellate courts, like the appellate courts of many other jurisdictions,

follow a practice of selective publication of their opinions. Cal. Rules of Court, Rules 976-978. Under this practice, only those opinions that satisfy certain stringent criteria are permitted to be published in the official California Appellate Reports, and these have historically included only a small minority of the opinions that have actually been issued by the appellate courts. Id., Rule 976(b). See Note, Decertification of Appellate Opinions, 50 S.Cal.L.Rev. 1181, 1182n.11 (1977). The initial decision whether to certify an opinion of a court of appeal for publication is made by the court that rendered it, but this decision may be overruled by the Supreme Court, which has the power to order that "[a]n opinion certified for publication shall not be published, [or that] an opinion not so certified shall be published." Id., Rule 976(c)(2). The Supreme Court very frequently exercises this power to "de-certify" or "de-publish" opinions previously certified for publication by the courts of appeal, and this is typically done by simply including a

directive to this effect in the same order in which the court denies the petition for review of the court of appeal's decision. Note, supra, 50 S.Cal.L.Rev. at 1184n.17, 1200-6; Biggs, Censoring the Law in California: Decertification Revisited, 30 Hast.L.J. 1577, 1577-78 (1979).

When an opinion of a court of appeal is not published, whether by reason of the court of appeal's initial failure to certify it for publication or by reason of a de-certification order of the Supreme Court, it is not allowed to be cited as precedent in any other proceeding in the California courts. Cal. Rules of Court, Rule 977(a). However, it retains its status as a dispositive adjudication of the rights of the parties in the case in which it was rendered, and additionally remains effective for purposes of applying the doctrines of law of the case, res judicata, and collateral estoppel. Id., Rule 977(b). See Note, supra, 50 S.Cal.L.Rev. at 1186; Biggs, supra, 30 Hast.L.J. at 1580.

In this case, the court of appeal initially

certified its opinion for publication, and it was accordingly published in both the advance-sheet edition of the official California Appellate Reports and in the West's California Reporter (J.S. App. A, p. 1; 195 Cal.App.3d 349; 240 Cal.Rptr. 558). However, when the Supreme Court thereafter entered its order denying Volt's petition for review of the court of appeal's decision, it included therein a further order to the effect that that the court of appeal's opinion should not be published in the permanent edition of the California Appellate Reports (J.S. App. B). The opinion will therefore not be published in the official reports, although it will of course remain published in the unofficial West's California Reporter with a notation indicating its "depublication" by the Supreme Court. See, e.g., Tietgen v. City of Pomona, 222 Cal.Rptr. 368 (1986); Jendralski v. Black, 222 Cal.Rptr. 396 (1986); McKenna v. Straughan, 222 Cal.Rptr. 462 (1986).

Stanford argues that the Supreme Court's entry of an order foreclosing official

publication of the court of appeal's opinion means, in effect, that the decision "in essence does not exist" for any purpose relevant to this appeal (Motion to Dismiss or Affirm, pp. 7, 16). Stanford further argues that, because of this allegedly "non-existent" status of the decision, an order of this Court dismissing this appeal would not have the usual effect of establishing a binding precedent on the issues raised by the appeal (id.). As will now be shown, both of these arguments are wholly unsound, the first because it ignores the relevant provisions of the California rules governing the dispositive status of unpublished opinions, and the second because it flatly contravenes the decisions of this Court concerning the precedential effect of dismissals of appeals from unpublished opinions of the lower courts.

The first of Stanford's arguments is effectively belied by what has already been said regarding the status accorded by the California rules to unpublished opinions of the California courts of appeal. As noted above,

the fact that a court of appeal's opinion is not published in the official Appellate Reports does not detract in any wise from its status as a dispositive determination of the rights of the parties in the particular case under adjudication. Cal. Rules of Court, Rule 977(b); Note, supra, 50 S.Cal.L.Rev. at 1186; Biggs, supra, 30 Hast.L.J. at 1580.

Accordingly, the court of appeal's decision in the present case constitutes a fully dispositive decision on the arbitrability of the pending dispute between Volt and Stanford which will, unless reversed by this Court, result in a deprivation of Volt's federally guaranteed right to arbitrate this dispute that is every bit as final and effective as it would have been if the opinion had been published. Id.. Except perhaps in some Pickwickian sense, therefore, there is no truth whatever to Stanford's assertion that the decision "does not exist" for purposes of the present appeal.

Stanford's additional argument that the non-publication of the court of appeal's opinion would also eliminate the precedential

value of an order of this Court dismissing this appeal is likewise demonstrably erroneous. This argument, first of all, makes the obviously unwarranted assumption that the precedential standing of orders issued by this Court is somehow determined by state-created rules governing the publication and citation of opinions of the state appellate courts. More importantly, the argument flies in the face of at least two decisions of this Court which squarely hold that orders dismissing appeals from decisions of the lower courts constitute binding precedents on the issues raised by such appeals notwithstanding the fact that the opinions of the lower courts in those cases were unpublished and therefore not citable as precedents in their own right.

Thus, as it happens, this Court's leading decision on the precedential effect of such summary dismissals in Hicks v. Miranda, 422 U.S. 332 (1975), involved a dismissal of an appeal from an unpublished opinion of a California appellate court which was subject to precisely the same state-law rules regarding

the publication and citation of appellate opinions as is the opinion of the court of appeal in this case. In that case, this Court held that its earlier dismissal of the appeal from an unpublished opinion of the Appellate Department of the California Superior Court in Miller v. California, 418 U.S. 915 (1974), had established a precedent binding on the lower courts with respect to each of the issues adjudicated in that earlier case. Hicks v. Miranda, supra, 422 U.S. at 343-45. The fact that the opinion of the lower appellate court in the Miller case, like the lower court's opinion in this case, was itself deprived of precedential value by state-law restrictions on the citation of unpublished opinions was simply disregarded by this Court in rendering its decision on the precedential effect of its own order dismissing the appeal in that case. Id.. See Cal. Rules of Court, Rule 977(a). The Court's holding in this regard was subsequently reaffirmed in Tully v. Griffin, 429 U.S. 68 (1976), where the Court likewise held that a "controlling precedent" had been established by

its earlier summary affirmance of a decision of a federal district court in Ammex Warehouse Co. v. Gallman, 414 U.S. 802 (1973), despite the fact that the decision below in the Ammex case was itself unpublished and therefore unavailable for citation as precedent. Tully v. Griffin, supra, 429 U.S. at 74.

These decisions of this Court effectively demonstrate that the lower courts' rules and practices concerning the publication and citation of their opinions have no effect whatever on the precedential standing of this Court's orders dismissing appeals from unpublished opinions. Under these decisions, such orders have been accorded just as much precedential value as similar orders of this Court disposing of appeals from published decisions of the lower courts. It follows that any order this Court may issue dismissing the present appeal would effectively enshrine as the law of the land the court of appeal's disposition of the issue raised in this case notwithstanding the fact that the lower court's opinion is itself unpublished and therefore

without precedential value as a matter of state law. Stanford's argument that the allegedly "non-existent" status of the court of appeal's opinion would somehow forestall this result must accordingly be rejected.

III. Stanford's Unfounded Accusation That Volt Has Made a "False" Factual Assertion in Its Jurisdictional Statement

In its Jurisdictional Statement, in the course of refuting the court of appeal's unfounded suggestion that the parties consciously "chose" to exclude their contract from the coverage of the Federal Arbitration Act, Volt made the following statements (Jurisdictional Statment, pp. 54-55):

The court [of appeal] itself acknowledges that neither party presented any direct evidence of the intent underlying the adoption of either the choice-of-law clause or the arbitration clause (App. A, p. 5). Indeed, since the personnel who executed the contract were construction executives and not lawyers (JA 22), it may fairly be presumed that they had never heard of either Calif. Code Civ. Proc. §1281.2(c) or the contrary provisions of the Federal Arbitration Act, and consequently had no clear idea of the potential significance of the choice-of-law clause with respect to the enforceability of their agreement to arbitrate their dispute.

In its Motion to Dismiss or Affirm, Stanford characterizes these statements as

embodying a "false" assertion of fact (Stanford's motion, p. 13n.3). In that regard, Stanford states (id.):

Volt asserts that the parties would not have been aware of Calif. Code Civ. Proc. §1281.2(c) because those who "prepared" the contract were not lawyers, citing to JA 22. (Jur. St., pp. 54-55) JA 22 is simply the signature page of the contract. There is no evidence to support Volt's assertion, and it is in fact false.

A comparison of these two passages from the parties' briefs will readily reveal that Stanford's accusation of falsehood against Volt is in fact based upon a flagrant misquotation of Volt's Jurisdictional Statement. Volt did not assert, as Stanford incorrectly claims, that the contract was "prepared" by non-lawyers, and Volt admittedly has no idea who "prepared" the contract, most of which, including the choice-of-law clause, was simply adopted from a standard-form construction agreement promulgated by the American Institute of Architects (JA 39). Rather, Volt merely stated that the contract was "executed" by non-legal personnel of the parties, and this statement is fully supported by Volt's citation of the contract's signature page, which

identifies the signatories as Volt's "Division Manager" and Stanford's "V.P. of Business and Finance" (JA 22).

Thus, the statement Volt actually made in its brief is quite true and properly attested by the record, while Stanford's own accusation of deceit is the only thing in this whole scenario that may accurately be described as "false." The caster of stones thus turns out to inhabit a glass house.

IV. Conclusion

For the reasons stated herein and in Volt's Jurisdictional Statement, the Court should either grant a plenary hearing of this appeal or summarily reverse the decision of the court below.

Dated: March 17, 1988

Respectfully submitted,

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